IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-54

MOORE BUSINESS FORMS, INC., *Petitioner,*

v.

UARCO INCORPORATED, *Respondent.*

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In its Brief in Opposition, Respondent claims that Petitioner has made an unjustified and unsupported attack on the conduct of the Seventh Circuit Court of Appeals. Petitioner has not attacked that or any court; it has merely presented facts to show that the Seventh Circuit is out-of-step with the other circuits.*

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* Since the petition in No. 1528 of the October, 1970 term to which reference was made in this petition has been dismissed, the pages referred to there from *The Crisis of Law in Patents*, Kayton, I., Patents Resources Group, Washington, D.C. 1970, showing the disparity of Seventh Circuit patent decisions, are reproduced at the end of these Reply and Supplemental Briefs. Thus the Seventh Circuit has held 31 patents valid since the Trilogy while second place goes to the Fifth Circuit with 16.

While certainly the article by Mr. Kayton, a professor of law at George Washington University, is unofficial, there is no official publication. Moreover, Professor Kayton's compilation has not been traversed by respondent. This is because the compilation is substantially correct: The Seventh Circuit has held more patents valid since *Graham*, 383 U.S. 1 (1966) than seven other circuits combined, and this includes the populous and litigious Second Circuit.

Rule 19(1)(b) of the Rules of the Supreme Court of the United States (1970) recites that an exemplary reason for considering the granting of a writ is "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ." If "matter" can refer to questions of patent validity generally, then the Seventh Circuit certainly rendered decisions not only extremely pro-patent but decidedly in conflict with similar decisions by other circuits.

Perhaps it is beneficial that Chicago patent attorneys enjoy a heavy case load while a patent infringement action in their home town is a rarity for attorneys in St. Louis and Minneapolis (8th Cir.—no patents held valid since Trilogy), but is it beneficial to Chicago patent attorneys or litigants? Administration of the law, it is submitted, must be conducted for the litigants, not their attorneys. An analogy to the mass resentment of negligence attorneys toward no-fault accident insurance is inescapable.

The solution to the present patent proclivities of the Seventh Circuit is not caustic derision of that circuit, but the establishment and reestablishment of guidelines on the question of patent invalidity for obvious-

ness under 35 U.S.C. § 103. Disregard by the Supreme Court can only intensify the anarchy in patent decisions by courts of appeal. Truly, is there any other field of law in which the courts of appeal differ so overwhelmingly with respect to their treatment of litigation?

On what type of cases should this Supreme Court grant certiorari? The answer must be: cases where the subject matter in issue is simple. There is only so much time available. For this court to spend days learning details of chemical formulae or electrical circuit diagrams would be prodigal. The path to uniform justice in patent decisions can be just as easily designated by reference to patents the subject matter of which can be understood on five minutes perusal.

The subject of the patent in suit is simplicity itself. The "invention" may be likened to a common roll of 8¢ stamps, each of which is joined to adjacent stamps along a line of perforations. One prior art patent shows the same roll but with 6¢ stamps; another prior patent discloses a single 8¢ stamp. Would this court find it obvious to substitute 8¢ stamps for 6¢ stamps in the roll? The chief Judge of the Northern District of Illinois so held and awarded attorney fees because the patent owner should not have even brought the case to trial. The Court of Appeals, first relying on the spurious concept of a "combination of references" while disregarding § 103 of the Patent Act, then on commercial success never attributed to what was claimed in the patent, found the substitution bewildering and held the patent valid. There is no better case for this court to begin its requirement of substantial uniformity among circuits than that now before it on this petition.

SUPPLEMENTAL BRIEF

Since the petition herein was filed, the petitioner has become aware of a declaratory judgment action based on the same patent held valid here by the Seventh Circuit. That is Civil Action 36658, *Perry Printing Co.* v. *Uarco, Inc.,* filed in the U.S. District Court for the Eastern District of Michigan on June 15, 1971, well after the Seventh Circuit decision had been published. Since Michigan is in the Sixth Circuit, not nearly so pro-patent as the Seventh Circuit, the Sixth Circuit Court of Appeals will now have an opportunity to pass on the validity of Uarco's patent. Yet, contrary to *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. —— (No. 338—October Term, 1970, decided May 3, 1971), any such conflict that will arise after the Sixth Circuit holds the patent invalid will not aid the present petitioner, as to whom the patent will be valid. In view of the continuing litigation of the validity of the patent here in issue, a review by this Court now will determine patent validity not only between petitioner and respondent, but between respondent and the other litigants who have and may challenge the Uarco patent in the future.

Respectfully submitted,

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APPENDIX

From the Crisis of Law in Patents

By

Professor Irving Kayton

of

The George Washington University

(Published, October, 1970, by Patent Resources Group, Washington, D.C.)

(NOTE: The term "*Trilogy*" is a shorthand expression used by Professor Kayton to refer to the *Graham*, *Calmar*, and *Adams* decisions, all of which were decided by this Court on the same day, February 21, 1966.)

COURT OF APPEALS PATENT VALIDITY AND INFRINGEMENT HOLDINGS AS REPORTED IN *U. S. P. Q.*

(After *Trilogy* and Up To and Including September 21, 1970)

Circuit No.	Valid	Valid and Infringed	Valid but Infringement Not Yet Decided
1	33.3% (3/9)	11.1% (1/9)	——
2	23.0% (6/26)	15.4% (4/26)	——
3	27.7% (5/18)	5.5% (1/18)	17.6% (3/18)
4	13.6% (3/22)	9.1% (2/22)	——
5	51.8% (16/31)	42.0% (13/31)	——
6	35.2% (6/17)	17.6% (3/17)	——
7	45.6% (31/68)	32.4% (22/68)	2.9% (2/68)
8	00.0% (0/17)	00.0% (0/17)	——
9	16.3% (8/49)	6.1% (3/49)	——
10	14.3% (1/7)	14.3% (1/7)	——
D. C.	20.0% (1/5)	20.0% (1/5)	——
Totals and Averages .	29.8% (80/269)	19.0% (51/269)	1.8% (5/269)

PATENT RESOURCES GROUP
Washington, D. C.
October 20, 1970